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IN THE

Supreme Court of the United States

October Term, 1958.

No. 834

THE COUNTY OF LOS ANGELES and the CITY OF BURBANK,

Petitioners,

vs.

THE FLYING TIGER LINE, INC., a corporation,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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Statement of the Issue.

Respondent respectfully submits, pursuant to Rule 24 of this Court, that the Petition for Writ of Certiorari filed herein should be denied since this case does not represent an issue for decision by this Court within the scope of 28 U. S. C. A. Paragraph 1257(3), nor is it one in which the "special and important" reasons required by Rule 19 of this Court for a review by Writ of Certiorari are present.

Facts and Contentions.

During the year 1953, the taxing authorities of the County of Los Angeles, in assessing *ad valorem* property taxes on aircraft moving in interstate and foreign commerce, applied a valid and constitutional formula. This formula was to impose a tax on flight equipment measured by the portion of its value represented by the percentage of time during the year that the equipment was physically present within Los Angeles County and receiving the benefits for which the tax was assessed. Arbitrarily, and without proper cause, the taxing authorities singled out five planes from the fleet of aircraft owned and operated by Flying Tigers during that year and taxed these planes at one hundred per cent of their value. This arbitrary assessment was based upon the erroneous belief that these five planes were not being operated on "scheduled" flights. The reason for this determination was that the aircraft in question were being used in connection with the Tokyo airlift operated by the Military Air Transport Service during the Korean War rather than on operations scheduled by the United States Civil Aeronautics Board. All other flight equipment of the respondent and all flight equipment of several other certified airlines operating in and out of Los Angeles County was taxed during this year in accordance with the County's time-in to total time formula.

After administrative relief from this arbitrary assessment was denied by the Los Angeles County Board of Supervisors, sitting as a Board of Tax Equalization, an action was commenced by the company in the Superior Court of the State of California in and for the County of Los Angeles. After hearing the evidence, the Trial Court determined the amount of tax collected over and

above what would have been collected had these five planes been accorded equal treatment, and ordered a refund of the excess amount. The Trial Court's opinion (reproduced as Appendix "C" of the Petition for Certiorari) stated in part, quoting from the case of *Simms v. County of Los Angeles*, 35 Cal. 2d 303, as shown at pages 41 and 42 of the Petition:

> " 'Assessments will be invalidated by the courts if the taxing authorities resort to arbitrary methods varying from that employed in assessing other property of like character and situation, and resulting in the imposition designedly of an unequal burden on the property of the complainant.' "
>
> "The record in this case seems to clearly establish that an 'arbitrary method' of assessing the five DC-4's 'varying from those employed in assessing property of like character and situation' was employed, and that it resulted in 'the imposition *designedly* of an unequal burden on the property of the complainant.' "

The Trial Court further found (Appendix "C," p. 38):

> "The record before the Board shows that the aircraft of United Air Lines, TWA and American Air Lines are taxed on an apportionment basis. [Tr. 20.]
>
> "There is no showing anywhere in connection with this case that the planes of any other company used in interstate or foreign commerce were assessed 100% of their value because they were not operated on schedules under the jurisdiction of the C. A. B.
>
> "It appears that Slick Airways are taxed on the apportionment basis. (See Slick Airways v. County of Los Angeles, 140 A. C. A. 321.) That company 'is engaged in flying a fleet of airplanes in interstate and foreign commerce' (p. 322)."

Thus the Trial Court afforded relief to Respondent consisting of an assessment of these five planes on the same basis as was used in assessing property of like character and situation during the year in question.

The Trial Court, the District Court of Appeal, an intermediate appellate court, and the California Supreme Court, all agreed that the company was entitled to relief from the arbitrary assessment of these five planes. Indeed, Petitioner conceded as much in his appeal briefs. The only difference of opinion among the judges was as to how this relief should be determined. On the evidence, the Trial Court determined and granted the relief; the California Supreme Court affirmed this decision. The District Court of Appeal and the minority opinion of the California Supreme Court felt that the matter should have been remanded to the Board of Tax Equalization. Thus the only issue decided was one of the proper procedure under California law, and such issue does not raise a Federal question under Section 28 U. S. C. A., Paragraph 1257(3).

The Petition for Certiorari fails to disclose the ultimate relief requested of this Court and thereby attempts to circumvent the jurisdictional requirements. Any relief which this Court could grant must of necessity direct that the matter be remanded to the Board of Tax Equalization if this Honorable Court deemed it appropriate to do so.

In the process of arguing this case, the County Counsel of Los Angeles County has evolved a new formula of valuation of these planes which he believes is preferable to that used by the County in 1953. To apply a new and different formula to Flying Tigers under these circumstances would clearly constitute a denial of equal protection of the law. The new method of assessment devised

by the County in the process of this litigation was not employed during the year 1953 and has not been employed previously or subsequent to such year.

Thus the determination sought in this case does not involve a true question under the United States Constitution. The company simply sought assessment of its aircraft on the same basis as was applied to property of like character and situation. This the company received by a determination of the California Supreme Court which decided a question of California procedural law.

As was pointed out in *United States ex rel. Herge v. Commonwealth of Pennsylvania*, 89 Fed. Supp. 636, citing the case of *Williams v. Kaiser*, 322 U. S. 471:

> "It is a well-established principle that before the Supreme Court will review a decision of a state court, it must affirmatively appear from the record that the federal question was presented to the highest court of the state having jurisdiction, and that its decision of the federal question was necessary to its determination of the cause. Where the decision of the state court might have been either on a state ground or on a federal ground, and the state ground is sufficient to sustain the judgment, the Supreme Court of the United States will not undertake to review the state decision."

This Court also stated in *Rice v. Sioux City Memorial Park Cemetery*, 349 U. S. 70 at page 74:

> "A federal question raised by a petitioner may be 'of substance' in the sense that, abstractly considered, it may present an intellectually interesting and solid problem. But this Court does not sit to satisfy a scholarly interest in such issues. Nor does it sit for the benefit of particular litigants. (Citations omitted.)

'Special and important reasons' imply a reach to a problem beyond the academic or the episodic. This is especially true where the issues involved reach constitutional dimensions, for then there comes into play regard for the Court's duty to avoid decision of constitutional issues unless avoidance becomes evasion."

Conclusion.

For the foregoing reasons, the Petition for Writ of Certiorari in this case should be denied.

Respectfully submitted,

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By CARL A. STUTSMAN, JR.,
LEON S. ANGVIRE,
Attorneys for Respondent.